

August 26, 2022

Small Claims Patent Court Comments  
Administrative Conference of the United States  
Suite 706 South  
1120 20<sup>th</sup> Street NW  
Washington, D.C. 20036  
Via email: info@acus.gov

To Whom it May Concern:

Pursuant to the Small Claims Patent Court Study Comment Request, 87 Fed. Reg. 26183 (May 3, 2022), I submit comments on a potential small claims patent court and how a properly constituted court would promote the progress of science and the useful arts.

### **BACKGROUND**

My name is Curt Evans. If the patent system does not work for me, it does not work for anyone. I am a patent attorney<sup>1</sup>, small business owner, and inventor who invented and patented technology used to fuse together an electronic book and an audiobook. Audible and Amazon call the technology “Whispersync for Voice,” enabling interactive electronic books and audiobooks on mobile devices. Amazon says my technology is a “*key strategic differentiator*” in the market, and Audible considers it one of its four “Milestones,” along with its very founding and its sale to Amazon in 2008 for **\$300M**. My technology is also part of **Amazon Music**, where lyrics can be used to navigate a song, accessible by every Amazon Prime subscriber (160+ million) and every Amazon Music Unlimited subscriber. Customers love my technology, and Amazon profits greatly as a result, albeit at my expense since no reasonable royalty is being paid. My patents are my personal, private property, and they took extensive time, money, innovation, ingenuity, and effort to acquire.

Amazon and Audible.com are infringing my patents, and the patents are presently involved in litigation, pending in the District of Delaware. My case is TrackTime, LLC v. Amazon, et al, Civil Action No. 1:18-CV-01518-MN.<sup>2</sup> I will have waited 5 years before my scheduled trial date in September, 2023.

I have also invented and patented improved sporting goods equipment, pioneering a fun and new golf-type game where a golf ball can be accurately thrown lacrosse-style over 200 yards. Players love it, and the game was a success on Shark Tank, causing sales in the low millions. My patent dispute resolved, but a small claims patent court would have been useful to resolving that case quicker and with a more equitable result at a lower cost.

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<sup>1</sup> I have been a patent attorney for over 25 years. I have a technical degree in chemical engineering and a law degree. I have been involved with over 150 patent infringement hearings and trials, for both plaintiffs and defendants of all sizes. I have eleven issued patents and more pending.

<sup>2</sup> The First Amended Complaint (80Mb, 566 pages) is available here: <https://tinyurl.com/y2bfv9ab>

## **COMMENTS**

Comments were solicited for the following topics:

### **1. Whether there is need for a small claims patent court.**

Yes, I believe that there is such a need. A small claims patent court (“SCPC”), properly instituted by Congress, can preserve access to a jury trial in an Article III court, limit the amount of damages available, and prevent the endemic assertion of invalidity in almost every patent infringement case. Challenging the validity of a patent occurs in almost every patent infringement case. This practice needs to end, especially since it is the primary factor disincentivizing individual inventors and small businesses from bothering to participate in the patent system.

A “small claim” for patent infringement ought to include all cases where the damages sought are capped at \$10 million, but where there remains the possibility of injunction. In exchange for a plaintiff capping damages at the threshold \$10 million, there shall be no invalidity defense available. Instead, the presumption of validity will be afforded actual weight.

Access to a small claims patent court, under the terms discussed here, would immediately be favored by individual inventors, small businesses, and micro-entity plaintiffs.

### **2. Policy and practical considerations in establishing a small claims patent court.**

Congress has plenary constitutional authority over patent policy, but Congress is constitutionally constrained to act “by securing” an “exclusive Right” to an Inventor. The main policies that need to be addressed include (1) clarifying patent subject matter eligibility, preferably by simply removing 35 U.S.C. 101, abrogating all so-called “judicial exceptions”, and allowing Sections 102, 103, and 112 to perform their respective functions, thereby restoring predictability and reliability of our nation’s patent laws; (2) providing the availability of injunction where there has been a finding of infringement; and (3) eliminating administrative review of patent validity where a patent owner has availed himself of the constitutional right to trial by jury. The policy considerations in any Small Claims Patent Court Act should be incorporated into findings of Congress, as follows:

(a) The Congress finds the following:

(1) Article 1, Section 8 of the United States Constitution vests in Congress the plenary authority to secure the “exclusive Right” to Inventors to their Discoveries for limited times, this “exclusive Right” being a property right – not a franchise or a public franchise – in order to foster continued innovation in the United States;

(2) Innovation and intellectual property are essential to the national security of the United States and, in order to maintain leadership in the global economy, Congress intends to enact strong and fair intellectual property laws, encouraging innovation by individuals and small

businesses and continued democratization of inventorship;

(3) Innovation is intended not for its own sake, but for others to use the inventions and discoveries of Inventors and to create further scientific, technological, and economic discovery and improvements. This furthers the progress of science and the useful arts. Innovation is best nurtured through a strong legal framework that protects ownership of intellectual property, as property. American innovation shall remain democratized, with meaningful legal protections being available and accessible to all Inventors, not only those financially best situated to afford it. American innovation (i) has advanced the art of medicine and technologies for health and wellbeing, (ii) has enhanced the standard of living for all people in the United States and those around the world, and (iii) has generally improved the agricultural, telecommunications, software, biotechnical, educational, pharmaceutical, and electronics industries, among many others;

(4) An issued United States patent carries a strong presumption of validity, rebuttable only by clear and convincing evidence, however, those charged with patent infringement routinely raise tardy, meritless, serial, unsuccessful, and unnecessarily burdensome challenges to one or more claims of a valid patent, diminishing the Inventor's "exclusive Right" and the goodwill and market exclusivity that ought to be afforded every Inventor and patent owner;

(5) The routine and near ubiquitous assertion of patent invalidity as a defense to patent infringement has created, and continues to create, substantial institutional burdens upon those government institutions charged with administering the patent laws, including the United States Patent and Trademark Office, the Courts, the International Trade Commission, and others, for example:

(i) by errantly calling into disrepute the ability of the United States Patent and Trademark Office to reliably and consistently examine patent applications before they are issued as patents to ensure an invention claimed in a patent application meets all statutory criteria for patentability,

(ii) by forcing upon the judiciary the necessity to adjudicate patent validity, where the judiciary, not Congress, has errantly taken upon itself responsibility for formulating so-called "judicial exceptions" to patent eligibility, despite the intent of Congress that 35 U.S.C. 101 and the use of the word "any" be read broadly, and

(iii) by forcing upon the judiciary the difficult task of determining a reasonable royalty to compensate a patent owner for patent infringement, such process assuming incorrectly the federal government can better determine a reasonable royalty, and achieve payment thereof, than can the free market acting as though (1) a patent is valid when issued and entitled to a strong and meaningful presumption of validity and (2) a patent carries with it an actual, constitutional "right to exclude" via injunction if a party is found to infringe;

(6) The adjudication of patent infringement cases must be timely and cost-effective, particularly since a patent's limited term is always waning. The routine assertion of patent invalidity as a defense to patent infringement has also created a substantial burden on any patent

owner seeking timely and cost-effective adjudication of alleged patent infringements. A patent owner must be able to quickly, inexpensively, and reliably exercise his “exclusive Right”, given the strong presumption that an issued patent is valid after having been competently, thoroughly, and professionally examined by the Office.

(7) To continue to encourage innovation and use of innovative Discoveries, voluntary commercial transactions between patent owner and those desiring to practice patented inventions are preferable to ongoing government intervention and are beneficial to sustaining the United States as the preferred venue for innovation and related investment. It is the intent of Congress to encourage patent licensing, assignments, capital investments, joint ventures, mergers, acquisitions, and other voluntary commercial agreements over lawsuits and administrative agency actions to determine issues of patent validity and infringement;

(8) The Supreme Court in *Oil States Energy Services, LLC v. Greene’s Energy Group, LLC* has misconstrued an issued United States patent as a particular right – a franchise – rather than a private, personal property right, whereas reiterating clearly and definitively that a patent is a private, personal property right of an Inventor comports with over 200 years of established law and Congress’ intent and exercise of its plenary authority to so determine, including in 35 U.S.C. § 261 which already states “patents shall have the attributes of personal property”;

(9) There exists a balance between (1) an accused patent infringer having recourse to assert an issued patent is invalid or unenforceable, which recourse must be undertaken in good faith and without unnecessary costs or burdensome delays, and (2) a patent owner having certainty that, for the limited time of the patent term, he is able to freely exercise the “exclusive Right” conferred by the patent (said Right having been acknowledged by Congress acting “by securing” for the Inventor his “exclusive Right” under Article 1, Section 8), for example by voluntarily licensing the technology to be developed by others or by commercializing the technology himself;

(10) An “exclusive Right” of a patent is neither “exclusive” nor “secured” under Article 1, Section 8 of the United States Constitution if, during its entire limited duration, it is subject to being invalidated or found unenforceable. Congress must follow the Constitution to act “by securing” exclusive rights to Inventors, and not by enacting legislation which, by its own design, makes the exclusive right for the Inventor an *insecure* property right during its entire limited duration. Therefore, Congress intends recourse for patent infringement in a Small Claims Patent Court, where money damages are limited to \$10 million and where there shall be no assertion of patent invalidity and where an injunction remains available to redress ongoing patent infringement; and a period of patent incontestability, securing for the Inventor a reasonable term with quiet title to the exclusive Right a patent confers;

(11) The “exclusive Right” of a patent is a property right exercisable by the patent owner enumerated specifically in the Constitution, which does not require that the patent owner practice the claimed invention. A patent confers by the text of the Constitution a negative right – a right of exclusion – and any unwanted trespass should be prevented by enjoining the trespass, until and unless the patent owner and the patent infringer agree, voluntarily, on commercial

licensing terms. A patent owner must be able to enjoin ongoing infringement upon his property right, rather than be forced into a compulsory license. If another desires to practice the claimed invention, the effective and efficient promotion of progress in science and the useful arts favors voluntary commercial agreements, as opposed to an infringer forcing continued and unwanted infringement upon the patent owner, in exchange for a governmentally-adjudicated compulsory license fee;

(12) A patent owner seeking to enforce its “exclusive Right” often incurs extremely burdensome litigation expenses and time delays, diminishing the limited time to which the law otherwise affords an “exclusive Right”, making timely and cost-effective legal relief all but unattainable for most patent owners;

(13) The burdens upon a patent owner desiring to enforce its “exclusive Right” have given rise to an “efficient infringement” business model whereby patent infringement occurs, often by large companies, or foreign companies, with little or no concern for any significant and meaningful legal or financial consequences. It is the intent of Congress to foster innovation by protecting strong, reliable, predictable property rights, and to discourage patent infringement of any kind, and in particular willful patent infringement, including by entities Congress has already determined are engaged in anti-competitive business practices; and

(14) Since an issued patent has a limited term that is constantly waning, it is necessary that Congress provide, in this Small Claims Patent Court Act, a period of time in the life of the patent in which the patent’s validity is incontestable, just as trademarks become incontestable after a period of time, and, for those times when patent validity is, in good-faith, in question, that we toll and thereby extend a patent’s term. As with the Lanham Act, 15 U.S.C. 1065, it is the sense of Congress that incontestability of patents and trademarks after a limited time is in the public interest and serves to promote the progress of science and the useful arts.

### **Policy concerning patent subject matter eligibility**

Congress should immediately act by clarifying patent subject matter eligibility, preferably by simply removing 35 U.S.C. 101, abrogating all so-called “judicial exceptions” nowhere authorized by Congress and usurping Congress’ plenary authority over patent policy, and allowing Sections 102, 103, and 112 to perform their respective functions, thereby restoring predictability and reliability of our nation’s patent laws. Judges and industry leaders agree Congress must fix this patent eligibility problem.<sup>3</sup> Congress must act immediately.

I am against the current proposed Patent Eligibility Restoration Act of 2022<sup>4</sup> proposed by Senator Tillis because it does not clearly say computer software is patent eligible. It creates

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<sup>3</sup> See, “Congress Should Reform Patent Eligibility Doctrine to Preserve the U.S. Innovation Economy,” Professor Adam Mossoff, <https://www.heritage.org/economic-and-property-rights/report/congress-should-reform-patent-eligibility-doctrine-preserve-the>; <https://www.ipwatchdog.com/2020/01/13/views-from-the-top-ip-leaders-sound-off-on-supreme-courts-refusal-to-wade-into-patent-eligibility-debate/id=117815/> (citing the Supreme Court’s denial of 48 petitions for certiorari regarding patent eligibility under 35 U.S.C. 101).

<sup>4</sup> <https://www.tillis.senate.gov/services/files/AC4F15C8-8652-4760-8EB9-8D064616DB3B>

more problems than it solves. The simple solution is to remove 35 U.S.C. 101, abrogating all so-called “judicial exceptions” nowhere authorized by Congress.

### **Policy concerning known anti-competitive business entities**

Next, in establishing a small claims patent court, Congress should formulate policy specifically considering the findings Congress already made concerning the anti-competitive business practices of Amazon, Apple, Google, and Facebook. In October, 2020, Congress issued a report on their anti-competitive conduct. See, "Investigation of Competition in Digital Markets, Majority Staff Report and Recommendations, House Subcommittee on Antitrust, Commercial and Administrative Law of the Committee of the Judiciary," October 6, 2020, <https://judiciary.house.gov/issues/issue/?IssueID=14921>; [https://judiciary.house.gov/uploadedfiles/competition\\_in\\_digital\\_markets.pdf](https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf)

The Report of Congress was the product of “a considerable evidentiary and oversight record.” The record upon which the Report was based includes: “1,287,997 documents and communications; testimony from 38 witnesses; a hearing record that spans more than 1,800 pages; 38 submissions from 60 antitrust experts from across the political spectrum; and interviews with more than 240 market participants, former employees of the investigated platforms, and other individuals totaling thousands of hours. The Subcommittee has also held hearings and roundtables with industry and government witnesses, consultations with subject-matter experts, and a careful—and at times painstaking—review of large volumes of evidence provided by industry participants and regulators.” *Id.*, at p. 8.

Congress’s study of Amazon’s anticompetitive business practices revealed problems. Congress found Amazon exhibits a “lack of candor” in attempt to excuse its bad business behavior. Congress concluded, “**On many fronts, Amazon makes inconsistent arguments depending on the forum and issue in support of its attempts to escape liability,**” taking positions according to the exigency of the moment. *Id.*, at p. 281 (emphasis added).

The anti-competitive business practices of these monopolists abusing their market size and power, unfortunately, also extends to their repeated and prolific patent infringement. The mere threat of even treble damages for willful patent infringement no longer dissuades these large companies from willful patent infringement.

By way of example, on a bi-partisan basis Congress itself found it difficult, if not impossible, to get these companies to behave responsibly. The House Judiciary Committee, by letter dated March 9, 2022, criminally referred Amazon to the DOJ for its “repeated misrepresentations,” lack of candor, refusal to turn over business documents “to conceal the truth,” engaging in a “pattern of obfuscation,” withholding “material information,” and making “false and misleading statements.” The letter concludes “**Amazon repeatedly endeavored to thwart the Committee’s efforts to uncover the truth about Amazon’s business practices.**” See, [https://judiciary.house.gov/uploadedfiles/hjc\\_referral\\_-\\_amazon.pdf](https://judiciary.house.gov/uploadedfiles/hjc_referral_-_amazon.pdf).

Having in mind the type of conduct experienced by Congress itself, Congress needs to be aware that individual inventors, small companies, and micro-entities are simply treated with

distain by these companies, who have absolutely no fear of being found to have infringed their patents. Congress needs to act immediately to protect patent owners from continued abusive business practices by these anti-competitive companies.

**Policy concerning Inter Partes Review, where a patent owner has requested a jury or availed itself of protections by a small claims patent court**

Because the damages in a small claims patent court can be capped at \$10 million, and because frivolous assertions of invalidity can be avoided as a consequence, Inter Partes Review should also be disallowed where a plaintiff avails itself of a jury and/or the small claims patent court. Proposed language follows:

“Limitations on Inter Partes Review.

“(a) Limitations on Inter Partes Review.—

“(1) AMENDMENT.— Section 31 of title 35, United States Code is amended – by adding to Section 311,

“(d) No patent having an effective filing date before March 16, 2013, shall be subject to any inter partes review,

“(e) No inter partes review shall apply to any patent owned by any entity having annual revenue under \$10 million, and

(f) No inter partes review shall apply if the patent owner demands a trial by jury, including a trial in a small claims patent court.

“(2) AMENDMENT.— Section 31 of title 35, United States Code is amended – by replacing Section 316 (e) to read,

“(e) EVIDENTIARY STANDARDS.—In an inter partes review instituted under this chapter, the petitioner shall have the burden of proving a proposition of unpatentability by clear and convincing evidence, the same burden required to invalidate any claim of any patent in an Article III court. There exists no burden on any patentee to prove patentability of any issued patent claim. Every claim of an issued patent is presumed valid.

“Sense of Congress.—It is the sense of Congress that—

(1) the right of a patent owner to trial by jury supersedes the desire of an accused infringer for post-grant administrative review of patentability, such as introduced by the Leahy-Smith America Invents Act, which implementation inadvertently harmed the progress of science and the useful arts by denying and or restricting the right of inventors to trial by jury and subjecting their patents to serial administrative challenges;

(2) post-grant administrative reviews invalidate patents at an unreasonably high rate and

disproportionately affect individual inventors and small businesses;

(3) a patent is a private property right that, once issued, does not constitute a waiver of the right to trial by jury, but rather the right to trial by jury must be protected, and validity of any issued patent must be adjudicated in a judicial proceeding, when a jury is demanded;

(4) the “exclusive Right” provided to Inventors in Article 1, Section 8, clause 8, of the United States Constitution, which right Congress has plenary authority to secure, does not and cannot require a waiver of any other constitutional right, including the right to trial by jury;

(5) there is no constitutional right which, when exercised, removes another constitutional right, and the promotion of progress of science and the useful arts does not and cannot require waiver of the right to trial by jury;

(6) it is the intent of Congress to limit all post-grant administrative reviews under chapters 30 and 32 of title 35, United States Code, if the patent owner demands a jury;

(7) no American should be forced into an administrative review of any private property right and thereby be effectively denied their right to a trial by jury; and

(8) patent applicants filing patent applications before the Leahy-Smith America Invents Act did so with the full and fair belief that any resulting patent did not have, and would not have, attached thereto any waiver of a right to trial by jury.”

**3. The institutional placement, structure, and internal organization of a potential small claims patent court, including whether it should be established within the Article III federal courts, as or within an Article I court, or as an administrative tribunal.**

Any small claims patent court should be an Article III court. Juries are the bedrock of the American judicial system and are critical to the administration of justice. As noted above, the constitutional right to trial by jury cannot be required to be waived in order to fully participate in the patent system in the United States. An Inventor’s right to invent cannot require waiver of access to a jury. Doing so makes as much sense as conferring a copyright only if one waives a right to freedom of speech. Patents and juries go hand in hand to help keep powerful companies from abusing the people and stealing their innovation.

**4. The selection, appointment, management, and oversight of officials who preside over proceedings in a potential small claims patent court.**

All Article III, United States District Courts shall be capable as acting as a small claims patent court. Administrative tribunals, no matter how well intentioned, are subject to political manipulation, bias, influence and abuse by large multinational corporations, and influences that do not otherwise affect juries. The PTAB and the IPR process has not inspired confidence in the fairness, impartiality, and integrity of the patent system, and for those reasons an administrative tribunal will not provide more access to actual justice than would access to a jury. Individuals

and small businesses rightly consider the PTAB a “death squad” for their hard-earned and already thoroughly examined patents, and the mere existence of the AIA and the PTAB simply dissuades untold numbers of inventors and innovators from bothering to participate in the patent system at all. By contrast, Article III courts provide a clear set of rules and an appearance of impartiality, especially when patent validity is removed from consideration in a small claims patent court.

It is also important that a small claims patent court complainant be able to access his nearest and most convenient district court, if he so chooses. Congress should amend statutes to reflect that jurisdiction and venue shall be appropriate if a small claims patent court complaint is filed in the District that is the domicile of the patent owner. Too often, large “efficient infringers” simply seek to transfer patent infringement litigation to their home district, unnecessarily increasing the litigation cost to the patent owner and giving the efficient infringer an unwarranted “home town” advantage, seeking to exploit their political influence over the court and their economic importance to the district.

Moreover, it is important not to have only one Article III small claims patent court. A single court can be subject to undue political pressure the same way an administrative agency can be captured by Big Tech and their efficient infringement lobby. Further, a geographically and politically distributed set of potential jurors and judges is preferable over the limited and relatively homogeneous jury pool around a single district court. The United States is not defined by bureaucrats living in Washington, DC, nor by inhabitants of her largest cities.

Handling small patent claims at the district court level would be simpler than establishing any new court.

**5. The subject-matter jurisdiction of a potential small claim patent court, whether participation in such proceedings would be mandatory or voluntary, and whether parties can remove cases to another administrative tribunal or federal court.**

As above, all Article III, United States District Courts shall be capable as acting as a small claims patent court. The Seventh Amendment to the U.S. Constitution provides the right to a jury trial for patent infringement cases. Therefore, any patent owner whose patents are infringed can opt for a jury, but if the complainant limits damages to \$10 million or less, the district court shall be designated as sitting as a small claims patent court.

**6. The procedures and rules of practice for a potential small claims patent court, including, as relevant, pleadings, discovery, and alternative dispute resolution.**

The primary features of a properly instituted small claims patent court are an adjudication by an Article III court of infringement, damages (capped at \$10 million), willfulness, enhanced damages, and whether or not an injunction is appropriate. The Federal Rules of Civil Procedure and Federal Rules of Evidence, and all related case law, are already well developed on these issues, with the exception that Congress should clarify the requirements for injunction after a finding of infringement. The Rules only need to be amended to reflect that a claimant in a small claims patent court accepts a cap on damages of \$10 million in exchange for a real,

actual, meaningful presumption of validity.

### **Pleadings**

A patent owner's pleading in federal district court must make clear that the claim of patent infringement is intended to be designated as a proceeding in the small claims patent court, limiting damages to \$10 million.

A complaint for patent infringement in the small claims patent court would be streamlined, since the complainant would no longer need to predict an affirmative defense of patent invalidity and address it at the pleading stage. Too much time is wasted in the litigation timeline where the defendant, often an efficient infringer, moves to dismiss because the patent is directed to a so-called "judicial exception." With patent validity being removed from the calculus in the small claims patent court, litigants and courts alike will avoid arguing about invalidity due to an "abstract idea", which no court can even define. Congress must address this charade of so-called judicial exceptions to patent eligibility, for many reasons, including the unnecessary increased costs to the litigants even at the pleading stage. The parties will save money and the courts will save time. The efficient infringer is left, then, to focus on arguments relating to patent infringement and damages, not validity. In my experience, juries are extremely adept at determining the more persuasive argument, seeing through gamesmanship by counsel by using their common sense. Juries are also very proficient at correctly determining damages.

### **Discovery**

The efficient infringer class desires limits on discovery, mostly to limit a claimant's ability to prove the infringer's bad acts of infringement and willfulness. Therefore, limited discovery is not in the interest of any claimant in a properly instituted small claims patent court, and it would unnecessarily thwart a patent owner's ability to achieve summary judgment on the issue of infringement.

### **ADR**

ADR is becoming less effective in settling cases, particularly where an efficient infringer or a known anti-competitive market participant is involved. The inconvenient truth is that they simply don't care if they infringe a patent, much less one worth under \$10 million. The quicker an Article III court can move toward a jury trial, the more likely a settlement will occur. Accordingly, the focus of a small claims patent court should be expeditiously moving a dispute to trial, not in moving parties to ADR.

## **7. Remedies a potential small claims patent court would be able to provide.**

### **Money damages**

Money damages in a small claims patent court should be capped at \$10 million.

### **Enhanced damages**

As explained above, efficient infringers and companies known to engage in anti-competitive business practices are no longer disincentivized by the mere threat of treble damages for willful patent infringement. Some of these companies have already been found to

have willfully infringed on multiple occasions. Still, their actions indicate they don't care, and paying damages for patent infringement is merely a cost of doing business for them. In my case against Amazon, for example, my patented technology is more valuable to Amazon's business when deployed to 165 million Amazon Prime subscribers and all Amazon Music Unlimited subscribers because of network effects that keep customers engaged within the Amazon ecosystem. For Amazon, and other companies operating at such enormous scale and with monopolistic and/or anti-competitive market share, infringement is still economically efficient even if the remedy is treble the amount of a reasonable royalty.

Congress should consider (1) making willful patent infringement a sufficient finding for enhanced damages, and (2) making treble the amount of a reasonable royalty the measure for damages where the infringer has in the past been found to have engaged in willful patent infringement.

### **Injunctive relief**

Injunctive relief should be available. The very right Congress is authorized by the Constitution to secure is an actual "exclusive Right." An infringer can pay a reasonable royalty, invent around a claimed invention, advance the state of the art with their own inventions, or simply stop infringing. An infringer cannot force a compulsory license upon a patent owner. In no way can the phrase in the Constitution "exclusive Right" be interpreted to mean a compulsory license in exchange for money, which more closely resembles a taking. Once Congress properly acknowledges, yet again, that a patent is property, Congress can likewise remind that it has no constitutional authority to take the property of A to transfer it to B. The Supreme Court in *Kelo* recognized, "[I]t has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation." See, *Kelo v. City of New London*, 545 U.S. 469 (2005).

35 U.S.C. 154 states, "Every patent shall contain a . . . grant to the patentee . . . of the right to exclude others . . ." The words "securing" and "the exclusive right" cannot be read out of the Constitution to substitute a compulsory license and cannot be rendered surplusage without effect, especially when the words "the exclusive right" from the Constitution are tracked by the corresponding statutory language "every patent" and "the right to exclude others." *Marbury v. Madison*, 1 Cranch 137, 174 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect").

With the threat of injunction reliably restored, the parties can negotiate an arm's length, free-market value for a license to compensate for ongoing infringement. Congress must re-visit the standards to be applied in order to enjoin ongoing infringement.

35 U.S.C. 283 can be amended as follows:

"The several courts having jurisdiction of cases under this title shall exclude others from making, using, selling, offering for sale, or importing, such infringing activities being described in 35 USC 154(a)(1), when such activity infringes any patent claim, except:

- (1) when the patent owner has granted a license to the infringer, or
- (2) when the infringer proves by clear and convincing evidence that:

- (a) infringement is in the public interest, and
- (b) there is no non-infringing alternative.

Upon such a showing, the infringer shall, for the term, pay ongoing money damages to the patent owner in an amount the greater of i) three times a reasonable royalty, or ii) two-thirds of the profit from the infringing activity.”

**8. The legal effect of decisions of a potential small claims patent court.**

The final determination of a district court sitting as a small claims patent court should be treated as any other determination of the district court. The standards for appeal on the issues of claim construction, infringement, and damages are clear and predictable. Because there would be no issues of validity adjudicated, there would be no appeals on that issue, which would alone save and conserve resources of appellate courts. The objective of any district court sitting as a small claims patent court ought to be to facilitate a voluntary licensing transaction or settlement, not to require further judicial intervention. Disputes should be resolved promptly and the parties should quickly return to their activities as innovators and implementers, not litigants. This is the best way to promote the progress of science and the useful arts.

**9. Opportunities for administrative and/or judicial review of small claims patent court decisions.**

Congress should clarify that the USPTO cannot trump or render moot an Article III court having made a determination as to patent infringement, damages, and injunction. Such determinations shall be reviewable by only the Federal Circuit and the Supreme Court.

The final determination of a district court sitting as a small claims patent court should be treated as any other determination of the district court. The standards for appeal on the issues of claim construction, infringement, and damages are clear and predictable. Because there would be no issues of validity adjudicated, there would be no appeals on that issue, which would alone save and conserve resources of appellate courts. The objective of any district court sitting as a small claims patent court ought to be to facilitate a voluntary licensing transaction or settlement, not to require further judicial intervention. Disputes should be resolved promptly and the parties should quickly return to their activities as innovators and implementers, not litigants. This is the best way to promote the progress of science and the useful arts.

Thank you for the opportunity to submit public comments. It is important we return to first principles to best promote the progress of science and the useful arts. Juries work. Democratization of inventorship works. Strong property rights work. Clear rules spur innovation and investment. Congress has plenary authority to act by securing exclusive rights to inventors, not to solidify and entrench monopolistic market share for companies engaged in anti-competitive business practices. Individual inventors and small businesses need Congress to act immediately. Thank you for considering these comments.